

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LESLIE VILLA,

Petitioner,

v.

WILLIAM HUTCHINGS, *et al.*,

Respondents.

Case No. 2:21-cv-02030-ART-VCF

ORDER

Respondents have filed a motion to dismiss in response to Leslie Villa's first amended petition (FAP) for a writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 27). ECF No. 31. Respondents argue that the petition was untimely filed and that claims contained in the petition do not relate back to a timely filed petition. Respondents also argue that some of Villa's claims are unexhausted. For reasons that follow, the motion is granted in part and denied in part.

I. Background¹

In 2015, Villa was convicted in Nevada's Fifth Judicial District Court of first-degree kidnapping, domestic battery (strangulation), and battery causing substantial bodily harm. The state district court sentenced Villa to life in prison with the possibility of parole after serving seven years. Villa filed a timely notice of appeal.

On July 28, 2016, the Nevada Supreme Court issued a decision affirming Villa's judgment of conviction. On February 1, 2017, Villa filed a petition for post-conviction relief in the state district court that was denied. Villa appealed. The Nevada Court of Appeals affirmed the lower court's denial, and a remittitur was issued on May 18, 2021.

¹ The information in this section is drawn from the state court recorded filed at ECF Nos. 19-21 and this court's own docket.

1 On November 1, 2021, Villa constructively filed the federal habeas
2 petition that initiated this proceeding. After this court appointed counsel, Villa
3 filed his FAP on April 17, 2023.

4 **II. Discussion**

5 **1. Timeliness**

6 The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-
7 year filing period for § 2254 habeas petitions in federal court. 28 U.S.C. §
8 2244(d)(1). The one-year period begins to run from the latest of four possible
9 triggering dates, with the most common being the date on which the petitioner's
10 state court conviction became final (by either the conclusion of direct appellate
11 review or the expiration of time for seeking such review). *Id.* Statutory tolling of
12 the one-year time limitation occurs while a “properly filed” state post-conviction
13 proceeding or other collateral review is pending. 28 U.S.C. § 2244(d)(2). The
14 period of limitation resumes when the post-conviction judgment becomes final
15 upon issuance of the remittitur. *Jefferson v. Budge*, 419 F.3d 1013, 1015 n.2
16 (9th Cir. 2005).

17 For amended federal petitions filed beyond the statutory period, the
18 Supreme Court's decision in *Mayle v. Felix*, 545 U.S. 644 (2005), limits a
19 habeas petitioner's ability to have newly-added claims “relate back” to the filing
20 of an earlier petition and, therefore, be considered timely under 28 U.S.C. §
21 2244(d). The Court held that an amended claim in a habeas petition relates
22 back for statute of limitations purposes only if it shares a “common core of
23 operative facts” with claims contained in the original petition. 545 U.S. at 663-
24 64. The common core of operative facts must not be viewed at too high a level of
25 generality, and an “occurrence,” for the purposes of Fed. R. Civ. P. 15(c), will
26 consist of each separate set of facts that supports a ground for relief. *Id.* at 661.
27 The scope of Rule 15(c) must be read in light of Habeas Rule 2(c), which
28 “instructs petitioners to ‘specify all [available] grounds for relief’ and to ‘state

1 the facts supporting each ground.” *Id.* (alteration in original).

2 The respondents argue that Villa’s FAP was filed beyond the statutory
3 time period for filing a federal habeas petition under 28 U.S.C. § 2254. They
4 identify Grounds 2, 3, 4(A), and 4(B) as claims that must be dismissed as
5 untimely because they do not relate back to the claims in a timely-filed
6 petition.² In response, Villa concedes that his FAP was not filed within the
7 statutory period, but disputes the respondents’ contention that the claims do
8 not relate back.

9 *Ground 2* – In Ground 2, Villa alleges that his conviction for domestic
10 battery (strangulation) and battery causing substantial bodily harm violates the
11 Fifth Amendment’s prohibition against double jeopardy. He argues that the
12 claim relates back because he alleged due process violations throughout his
13 initial federal petition (ECF No. 7) and attached to that petition the Nevada
14 Supreme Court’s decision addressing the double jeopardy argument he raised
15 on direct appeal.

16 Villa is correct that attachments to a timely petition can provide the
17 necessary facts to support relation back, but the petition itself must at least
18 identify specific grounds for relief to which the facts relate. *See Ross v. Williams*,
19 950 F.3d 1160, 1170 (9th Cir. 2020) (“If a petitioner attempts to set out habeas
20 claims by identifying specific grounds for relief in an original petition and
21 attaching a court decision that provides greater detail about the facts
22 supporting those claims, that petition can support an amended petition’s
23 relation back.”). Even under *Ross*, however, facts contained in attachments to
24 the initial petition cannot provide the basis for relation back if they are not
25

26 ² In their initial motion to dismiss, the respondents also identified Grounds 1 and 4(C)
27 as claims that do not relate back. In their reply, they concede that Ground 1 does
28 relate back. ECF No. 47 at 3. With respect to Ground 4(C), respondents “withdraw their
argument as to relation-back because [their] failure to exhaust argument ... provides a
stronger basis for dismissal.” ECF No. 47 at 6.

1 related to grounds for relief asserted within the timely petition. *Id.* at 1168 (“If
 2 an exhibit to the original petition includes facts unrelated to the grounds for
 3 relief asserted in that petition, those facts were not ‘attempted to be set out’ in
 4 that petition and cannot form a basis for relation back.”).

5 That is the case here as the relevant facts in the Nevada Supreme Court
 6 decision do not relate to a ground for relief within Villa’s initial petition.³ Villa’s
 7 initial petition does not contain the core of operative facts supporting Ground 2
 8 of his FAP. Thus, Ground 2 is time-barred.

9 *Ground 3* – In Ground 3, Villa alleges that the State violated his right to
 10 due process when, in bad faith, it refused to collect and preserve a sample of
 11 his urine or blood to corroborate his voluntary intoxication claims. Ground 3
 12 shares a common core of operative facts with claims contained in Villa’s initial
 13 petition. ECF No. 7 at 7, 28-29, 47-48. Thus, Ground 3 is not time-barred.

14 *Ground 4(A)* – In Ground 4(A), Villa alleges that his trial counsel was
 15 ineffective for failing to investigate and properly prepare his expert, Dr. Melvin
 16 Pohl, and to ensure that Dr. Pohl conducted an individualized assessment of
 17 Villa to determine whether he had in fact acted under the influence of
 18 phentermine on the day of the crimes. Villa claims that, had counsel completed
 19 those tasks, he (Villa) would have been able to demonstrate that his voluntary
 20 intoxication precluded him from forming the intent required to commit first-
 21 degree kidnapping or domestic battery by strangulation.

22 Villa argues that Ground 4(A) relates back to Grounds 1 and 3 of his
 23 initial petition. Ground 1 of the initial petition asserts various claims of
 24 ineffective assistance of counsel but makes no reference to Dr. Pohl or to

25 ³ This court’s noncapital Section 2254 habeas petition form and the instructions direct
 26 the petitioner to attach to his petition a copy of all state court written decisions
 27 regarding his conviction. [https://www.nvd.uscourts.gov/wp-](https://www.nvd.uscourts.gov/wp-content/uploads/2017/08/2254-Habeas-Petition-NOT-Sentenced-toDeath-Packet.pdf)
 28 In all likelihood, Villa was merely complying with that direction rather attempting to
 provide additional factual details in support of his claims.

counsel's alleged failure to prepare a voluntary intoxication defense. ECF No. 7 at 3, 43-44. Ground 3 of the initial petition alleges that the State failed to preserve evidence regarding Villa's apparent intoxication when he was arrested and interrogated. ECF No. 7 at 7, 28-29, 47-48. Ground 4(A) in the FAP is based on a different nucleus of facts than Grounds 1 and 3 of the initial petition. Thus, Ground 4(A) does not relate back to the initial petition and is, therefore, time-barred. *See Schneider v. McDaniel*, 674 F.3d 1144, 1151 (9th Cir. 2012) (the fact that claims share a fact "is not sufficient to conclude that they arise out of a common core of operative facts").

Ground 4(B) – In Ground 4(B), Villa alleges that his trial counsel was ineffective for failing to object to prosecutorial misconduct during closing statements. Ground 4(B) incorporates Ground 1 of the FAP, wherein Villa alleges that the prosecutor injected his personal opinion and beliefs regarding Villa's guilt, urged the jury to disregard jury instructions, and denigrated and ridiculed defense counsel. Ground 4(B) shares a common core of operative facts with claims contained in Villa's initial petition. ECF No. 7 at 3, 5, 43, 45-46. Thus, Ground 4(B) is not time-barred.

2. Exhaustion

Generally, this court is not permitted to grant habeas relief unless the petitioner has exhausted the remedies available in the state court. See 28 U.S.C. § 2254(b). The exhaustion requirement is a matter of comity, intended to afford the state courts "an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citations and internal quotation marks omitted). In order to provide the state courts with the requisite "opportunity" to consider his federal claims, a prisoner must "fairly present" his claims to each appropriate state court for review, including a state supreme court with powers of discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513 U.S. 364,

1 365 (1995), and *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

2 Respondents argue that Grounds 1, 3, and 4(A-C) are unexhausted.

3 *Ground 1* – In Ground 1, Villa alleges that prosecutorial misconduct that
4 occurred during closing arguments deprived him of his Fifth Amendment right
5 to due process. As noted above, he supports the claim with allegations that the
6 prosecutor injected his personal opinion and beliefs regarding Villa's guilt,
7 urged the jury to disregard jury instructions, and denigrated and ridiculed
8 defense counsel.

9 Villa argued on direct appeal that he was entitled to relief based on
10 prosecutorial misconduct during closing statements. ECF No. 20-26 at 40-42.
11 The Nevada Supreme Court addressed the argument in its decision affirming
12 Villa's conviction. ECF No. 20-30 at 4. While Ground 1 cites remarks by the
13 prosecutor that were not included in Villa's direct appeal brief, that it is not
14 sufficient to render the claim unexhausted. *See Chacon v. Wood*, 36 F.3d 1459,
15 1468 (9th Cir. 1994) (“[N]ew factual allegations do not render a claim
16 unexhausted unless they ‘fundamentally alter the legal claim already
17 considered by the state courts.’” (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260
18 (1986))). Ground 1 is exhausted.

19 *Ground 3* – Villa exhausted Ground 3 by arguing on direct appeal that the
20 State's failure to preserve Villa's blood for testing violated his federal right to
21 due process. ECF No. 20-26 at 21-25.

22 *Ground 4(A)* – Villa exhausted Ground 4(A) by fairly presenting the claim
23 to the Nevada Supreme Court when he appealed the state district court's denial
24 of his state post-conviction proceeding.⁴ ECF No. 20-43 at 20-34.

25 *Ground 4(B)* – Villa exhausted Ground 4(B) by fairly presenting the claim
26 to the Nevada Supreme Court when he appealed the state district court's denial
27

28 ⁴ The appeal was referred to the Nevada Court of Appeals for a decision. ECF No. 20-48.

1 of his state post-conviction proceeding. ECF No. 20-43 at 34-39.

2 *Ground 4(C)* – In Ground 4(C), Villa alleges that his trial counsel was
3 ineffective for failing to adequately challenge the victim’s testimony regarding
4 the substantial bodily harm purportedly inflicted by Villa. Villa argues that he
5 exhausted this claim when he appealed the state district court’s denial of his
6 state post-conviction proceeding, but the claim is not included in his opening
7 appellate brief. ECF No. 20-34. Villa contends that he nonetheless fairly
8 presented the claim because it was included in his pro se post-conviction
9 petition, which in turn was included in the appendix he submitted to the
10 Nevada Supreme Court in support of his appeal. However, Nevada’s appellate
11 rules do not allow for incorporation by reference to issues presented in an
12 appendix but not argued in the appellate brief. *See Nev. R. App. P. 28(e)(2)*
13 (“Parties shall not incorporate by reference briefs or memoranda of law
14 submitted to the district court or refer the Supreme Court to such briefs or
15 memoranda for the arguments on the merits of the appeal.”). Thus, Ground 4(C)
16 is unexhausted. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (exhaustion
17 cannot be achieved by a procedurally deficient or improper means).

18 Alternatively, Villa argues that Ground 4(C) is technically exhausted
19 because it would be procedurally barred if he returned to state court and that
20 he can demonstrate cause and prejudice to overcome the procedural default.
21 Villa is correct that any state petition he files at this point would be both
22 untimely and successive under Nevada’s procedural rules. *See Nev. Rev. Stat.*
23 *§§ 37.726, 34.810*. He is also correct that, under such circumstances, a claim
24 that has yet to be fairly presented to the state court “is technically exhausted
25 but will be deemed procedurally defaulted unless the petitioner can show cause
26 and prejudice.” *See Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011).

27 Villa contends that he can establish cause and prejudice under *Martinez*
28 *v. Ryan*, 566 U.S. 1 (2012). “Under *Martinez*, the procedural default of a

1 substantial claim of ineffective assistance of trial counsel is excused, if state law
2 requires that all claims be brought in the initial collateral review proceeding ...
3 and if in that proceeding there was no counsel or counsel was ineffective.”
4 *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019) (citing *Martinez*, 566 U.S.
5 at 17)). However, the Court in *Martinez* emphasized that its ruling applied to
6 initial-review collateral proceedings only and not to any other proceedings,
7 including appeals from initial-review collateral proceedings. 566 U.S. at 16.

8 Here, Villa raised Ground 4(C) in the pro se petition he filed in the state
9 district court. ECF No. 7 at 43-46, 53-54. He cites his appointed counsel’s
10 ineffectiveness in “fail[ing] to . . . assert the claim on appeal” as the cause for
11 his default. ECF No. 41 at 27. Because *Martinez* unambiguously excludes
12 ineffective assistance of counsel on post-conviction appeal as cause to excuse a
13 procedural default, Villa’s *Martinez* argument fails. Thus, Ground 4(C) must be
14 dismissed as procedurally defaulted.

15 **III. Conclusion**

16 IT IS THEREFORE ORDERED that respondents’ motion to dismiss (ECF
17 No. 31) is GRANTED in part and DENIED in part. Ground 2, Ground 4(A), and
18 Ground 4(C) of the first amended petition for a writ of habeas corpus (ECF No.
19 27) are dismissed.

20 IT IS FURTHER ORDERED that respondents have 60 days from the date
21 of entry of this order to file an answer to the remaining grounds for relief in the
22 petition. Villa shall have 60 days from the date on which the answer is served
23 on him to file and serve a reply.

24 Dated this 23rd day of September, 2024.

25
26 

27 ANNE R. TRAUM
28 UNITED STATES DISTRICT JUDGE